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TABLE OF CASES

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1370

DENNIS COATES, et al.,

Appellants,

v.

CITY OF CINCINNATI,

Appellee.

Appeal from the Supreme Court of Ohio

APPELLANTS' BRIEF

This is an appeal from a decision of the Supreme Court of Ohio affirming the convictions of Appellants Dennis Coates, James Hastings, Wendell Saylor, Arnold Adams and Clifford Wyner in the Hamilton County Municipal Court at Cincinnati, Ohio. They were convicted of violating the Cincinnati Loitering Ordinance which provides for conviction of defendants who conduct themselves in a manner annoying to persons passing by.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported in 21 Ohio St. 2d 66 (Appendix, p. 7).

JURISDICTION

The majority opinion and the dissenting opinion of the Supreme Court of Ohio specifically considered the federal constitutional question; the case holds that the municipal ordinance involved does not violate the First and Fourteenth Amendments to the Constitution of the United States. Jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257(2). The opinion and final order of the Supreme Court of Ohio are dated January 28, 1970; Notice of Appeal was filed in that Court on February 17, 1970. The Jurisdictional Statement herein was filed on March 30, 1970 and the Court Noted Probable Jurisdiction on May 18, 1970.

CONSTITUTIONAL PROVISIONS AND ORDINANCE

The First and Fourteenth Amendments to the Constitution of the United States are Appendix A and Appendix B, respectively, to this Brief.

The ordinance involved is Cincinnati Ordinance, Section 901-L6. Loitering at Street Corners; it appears at page 498 of the 1956 edition of the Code of Ordinances of the City of Cincinnati:

> **Section 901-L6. Loitering at Street Corners.**
>
> It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.

QUESTION PRESENTED

Constitutionality of the subject ordinance is the question presented. Overbreadth and vagueness are the features of these cases. The chilling effect of the language of the whimsically labeled "Loitering Ordinance" has been condemned by widely scattered Ohio courts. Those courts declared the language violative of First and Fourteenth Amendment concepts or they found from the facts of the cases that convictions could not be justified.

STATEMENT

The only facts revealed by the record are the status of Defendant Coates as a student involved in a demonstration (Appendix, p. 23) and of Defendants Hastings, Saylor, Adams and Wyner as pickets in a labor dispute (Appendix, p. 26). The cases are presented solely as to the constitutionality, on its face, of Cincinnati's Loitering Ordinance. The broad importance which attaches to the existence of the Ordinance is illustrated by the variety of its victims and the methods of its use. The argument which follows attempts to explain that importance.

SUMMARY OF ARGUMENT

The ordinance which makes "annoyance" a crime is vague. It could be useful for a government of men rather than a government of laws. Different men are susceptible to different levels of annoyance and thus must apply different standards to claimed violations.

The ordinance discriminates between persons who annoy as members of small groups (prohibited) and those who annoy as members of a public meeting of citizens (allowed but not defined).

Whoever merits the displeasure of a Cincinnati official is a fair target for this "catch-all" ordinance permitting arrest of those who, by the Ohio Court's definition in the majority opinion, irritate or provoke or trouble persons passing by.

The Loitering ordinance is used to excuse police transportation of nonconformists (to the jailhouse) from the immediate area where they have displeased or irritated or annoyed Cincinnati officialdom — it has come to symbolize repression, discrimination, intolerance and arrogance to the groups whose members have been charged with "loitering."

ARGUMENT

The conduct prohibited by the ordinance is vague and so imprecise of definition that a person is unable to determine what conduct, in which he may be engaged, will later be construed as being "annoying to persons passing by, or occupants of adjacent buildings." Various standards and levels of annoyance may, and certainly do, prevail from person to person and from group to group. Accordingly, no standard is established by which a person may know what conduct is annoying and no such determination can be made until the person who claims to be annoyed causes an arrest. The failure to establish a standard of prohibited conduct is in conflict with the requirement of due process.

Any legislative attempt to abrogate the right of individuals to assemble and associate together is prohibited by the Constitution even though the legislation is ostensibly motivated by a desire to insure peace and order in the community. *Thornhill* v. *Alabama* (1940), 310 U.S. 88; *Edwards* v. *South Carolina* (1963), 372 U.S. 229.

The terms of a penal statute defining an offense should

be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to punishment — such a requirement is consonant alike with ordinary notions of fair play and the settled rules of law. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the basic concept of due process of law.

The dissenting opinion in this case, points out (*Cincinnati* v. *Coates*, 21 Ohio St. 2d 66 at 70, Appendix, page 11) that the syllabus adopted by the majority does not contain all of the pertinent language of the ordinance. The dissent goes on to recognize the rules of construction which the United States Supreme Court has applied to penal statutes and recognizes that stricter standards of permissible statutory vagueness should be applied to an ordinance which has a potentially inhibiting effect upon rights guaranteed by the First Amendment of the Constitution. Also emphasized is the rule that a generally worded statute construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and the constitutionally impermissible applications. The dissent recognizes that the foregoing principles have been applied by the United States Supreme Court in decisions, among others, written in 1926, 1931, 1940, 1947, 1948 and 1959.

As the dissenting opinion points out (Appendix, page 13) the decision below approves "annoying" behavior which the ordinance allows at a public meeting of citizens but permits criminal conviction for "annoying" behavior under other circumstances, and never does explain what conduct is included.

Police who have the "annoying" tool available have a natural disinclination to exert the care and effort necessary to charge a wrongdoer with a specific offense. More importantly, they are tempted to ignore the constitutional protections guaranteed by the Bill of Rights and become truly Police State functionaries who exercise authority against those deemed to merit their displeasure or those who irritate their superiors. Note that the majority opinion below equates "annoy" with "irritate" (Appendix, page 10).

As the Judge of the Toledo, Ohio Municipal Court observed in 1960, when Williamsburg, Virginia was frequented in 1774 by "loiterers" who included Patrick Henry, Thomas Jefferson and Peyton Randolph, Governor Dunsmore could have made short shrift of our budding democracy by having his constables round up and imprison those of the Country's Founding Fathers who were causing an annoyance. *Toledo* v. *Sims*, 14 Ohio Opinions (2d) 66, 84 Ohio Law Abs. 476.

Some twenty years earlier the Common Pleas Court which has jurisdiction in the Cincinnati area had ruled on the language used in the Cincinnati ordinance and found it unconstitutional. The Judge in that case went as far back as 1603 to illustrate the restraints on freedom which are built into the Cincinnati Loitering Ordinance. He referred to the clan MacGregor which had incurred the wrath of King James VI of Scotland and had been prohibited "to assemble in greater numbers than four." The Ohio Judge noted that the Defendant in his case may have been as pestiferous in the eyes of the police as a MacGregor had been in the eyes of King James VI, but in view of the provisions of the Fourteenth Amendment, he reversed the conviction. *Deer Park* v. *Schuster*, 16 Ohio Opinions 485, 30 Ohio Law Abs. 466.

The Cleveland, Ohio area was temporarily relieved of fear of conviction for "annoyance" in 1968 when Judge Corrigan (who wrote the majority opinion in 1970 in *Cincinnati* v. *Coates*) wrote "Neither the Police or a citizen can hope to conduct himself in a lawful manner if an ordinance which is designed to regulate conduct does not lay down ascertainable rules or guide lines to govern its enforcement." *Cleveland* v. *Anderson*, 13 Ohio Appeals (2d) 83, 88-90 (Jurisdictional Statement, page 6).

The Supreme Court of Ohio held in 1962 that to permit a criminal conviction of the owner of a barking dog which was creating an annoyance was unconstitutional because the test was vague. "What degree of noise must there be to constitute an annoyance? Are noises included that would be annoying to a few sensitive people but would not disturb others?" *Columbus* v. *Becher*, 173 Ohio St. 197, at 199 (Jurisdictional Statement, page 6).

The Toledo case involved businessmen. The Deer Park case involved Halloween celebrants. The Cleveland case involved possible socialist sympathizers. The cases on appeal to this Court involve a student dissenter and union pickets. The Columbus case involved barking dogs.

In Cincinnati negroes have felt they are particularly susceptible to persecution by the Loitering Ordinance. Of course the Loitering Ordinance has nothing to do with loitering but rather is used to quell such activity as incurs the displeasure of the officials. The 1967 Cincinnati racial disturbances were to some degree connected with Police use of the Loitering Ordinance. A negro leader, Lathan Johnson, was effectively removed from his people and put to great distress in reversing the swift and sure conviction which followed his "loitering" arrest. As the Appellate Court found, he had been convicted of guilt by association. The unreported opinion in that case is Appendix C to

this Brief; a newspaper comment concerning the case is Appendix E in our Jurisdictional Statement. The community atmosphere and impact of the case appears in the Report of the National Advisory Commission on Civil Disorders, April 1968, The New York Times Edition, E. P. Dutton and Co., Inc., pages 47-50.

Probably the most unfair use of the ordinance is not for those who, until now, have invariably been able to get a dismissal or reversal on the facts if they persevered, but rather its use on the unsophisticated miscreants who, dragged off to the Police Station in the evening, plead guilty the next morning and thus have an established record for conviction of an ill-defined offense which may well have been, legally, no offense at all. Thus encouraged, lazy officers or, worse, malevolent officials, have less reason to adhere to the principles of law, order and justice which must necessarily prevail for the continuation of our form of government.

By leaving the whimsically labeled legislation in effect while doubting its constitutionality (see the statement to that effect in the Lathan Johnson opinion at page 16 of Appendix C herein) the lower courts permit use of the ordinance for harrassment of both the helpless miscreant who knows no better and the more erudite agitator – the distinction fades when the victim has been arrested and hauled away. Eventual acquital of the more sophisticated or more affluent defendant does not cure the lack of due process inherent in the detention for "annoyance."

This Court has often stated that legal devices which might be applied in a manner consistent with the Constitution may not be constitutionally capable of application where it would have the effect of inhibiting freedom of expression by making persons reluctant to exercise it. *Smith* v. *California,* 361 U.S. 147, 150. In appraising a

statute's inhibitory effect, this Court has not hesitated to take into account possible applications in a variety of factual contexts. The Court has recognized the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433. The Court has found in most of the situations presented that an authoritative narrowing interpretation could not cure the vagueness. Saying the defendant could not be sent to jail for a crime he could not with reasonable certainty know he was committing, the Supreme Court disapproved a conviction following legislative committee questions with a vague purpose. *Scull* v. *Virginia, ex rel. Committee on Law Reform and Racial Activities* (1959), 359 U.S. 344.

Improper vagueness has been found in a prohibition to loiter or picket, *Thornhill* v. *Alabama* (1940), 310 U.S. 88; claimed breach of the peace by patriotic and religious songs, *Edwards* v. *South Carolina* (1963), 372 U.S. 229; prohibition against high prices, *United States* v. *Cohen Grocery Co.* (1921), 255 U.S. 81; prohibition against low wages, *Connally* v. *General Construction Co.* (1926), 269 U.S. 385; prohibition of being a gangster, *Lanzetta* v. *New Jersey* (1939), 306 U.S. 451; prohibition against disturbing the peace, *Ashton* v. *Kentucky* (1966), 384 U.S. 195 and *Terminiello* v. *Chicago* (1949), 337 U.S. 1; suggesting litigation, *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415; prohibition of use of public parks, *Wright* v. *Georgia* (1963), 373 U.S. 284; inhibiting the sale of books, *Smith* v. *California* (1959), 361 U.S. 147; requiring an oath by school teachers, *Cramp* v. *Board of Public Instruction* (1961), 368 U.S. 278; displaying sacrilegious films, *Joseph Burstyn, Inc.* v. *Wilson* (1952), 343 U.S. 495; dealing in stories of lust or crime, *Winters* v. *New York* (1948), 333

U.S. 507; and prohibiting display of a red flag, *Stromberg* v. *California* (1931), 283 U.S. 359.

The majority opinion of the Supreme Court of Ohio, in the cases here on appeal, complains that without a full transcript of the testimony no determination could be made of the particular conduct which was considered annoying. We submit that the annoying test is too broad, and that, as the dissenting opinion states, the only question for decision is the constitutionality, on its face, of the Cincinnati Loitering Ordinance. Not only was similar legislation declared unconstitutional, and soundly criticized, but an excellent recitation of the persuasive reasons and the authorities therefore was presented in the Louisville, Kentucky decision of *Baker* v. *Bindner* (1967), 274 Fed. Supp. 658.

CONCLUSION

We urge that The Supreme Court of Ohio has upheld legislation which is unconstitutional because of vagueness and overbreadth as described in *Lanzetta* v. *State of New Jersey*, 306 U.S. 451 and Harvard Law Review, February, 1970, page 844, and which lends itself to ready use by officials against those deemed to merit their displeasure, *Thornhill* v. *State of Alabama*, 310 U.S. 88, and should be reversed.

Respectfully submitted,

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Counsel for Appellants

APPENDIX A

UNITED STATES CONSTITUTION AMENDMENTS

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX B

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State,

or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY

No. 10532

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

LATHAN JOHNSON,
Defendant-Appellant.

OPINION

August 19, 1968

APPEAL ON QUESTIONS OF LAW
FROM COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Messrs. William A. McClain, Ralph E. Cors and Simon L. Leis, Jr., for Plaintiff-Appellee,

Messrs. Beckman, Lavercombe, Fox & Weil, Robert R. Lavercombe of counsel, for Defendant-Appellant.

DOYLE, J.

The appellant, Lathan Johnson, was convicted and sentenced in the Municipal Court of Cincinnati for the

violation of Section 901-L6 of the Code of Ordinances of the city. The ordinance is as follows:

> "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00) or be imprisoned not less than one (1) nor more than thirty (30) days or both."

Assignments of error are presented as here shown:

> "1. The ordinance under which the defendant was convicted is unconstitutional."
> "2. The judgment of the court was not sustained by sufficient evidence and is contrary to law."
> "3. The court erred in imposing a maximum sentence."
> "4. The trial court's pre-trial statements raised a question as to the possibility of defendant receiving a fair trial."

A brief summary of pertinent facts as gleaned from the record of testimony may be stated, to wit: In the evening of June 12, 1967, civil disturbances commenced in the Cincinnati area, which increased to the intense quality of severe riots in the several days following. Police officers were dispatched, on June 12th, to the troublesome area to quell the disturbances and to attempt to prevent an incipient riot. Several hundred persons were observed on the street and sidewalks; bottles and rocks were being thrown and the police were subjected to verbal abuse. Shortly thereafter, a police order was issued to disperse the crowd and to clear the people from the streets and sidewalks. A group of officers in block or line formation,

while proceeding on one of the streets, encountered a good size group of violently aroused people. As the officers advanced, the crowd moved back, excepting only the appellant, Lathan Johnson, who remained standing on the sidewalk. He was told to move on and, upon his refusal to comply with the order of the police, he was arrested. He was given amply opportunity to avoid arrest by walking elsewhere.

The appellant was a professional social worker, and the evidence shows only that he had gone to the troublesome area to assist in preserving order. He testified: "* * * I walked behind the group and stood there, and then I turned to begin helping get the kids off the street because supposedly there was a fear that someone was going to try to confront the police, and we did not want any of the kids to get hurt because the guns were already out and there was a lot of this milling around and there was a lot of uncertainty * * *; and then the group that I was working with to get the kids off the street had seemingly — we had seemingly gotten it quiet; and then all of a sudden * * * came this phalanx of police."

The police officer who made the arrest testified that, as the crowd moved on under police orders, he saw the appellant emerge from the crowd. He was then told: "You'll have to leave this area now because of the condition of what's going on here." The appellant did not reply, nor did he move on. Whereupon, the officer said: "Will you leave" or "Are you going to leave"; receiving no reply to these questions, the officer repeated the request a third time, whereupon the appellant replied, "Why?" In reply, the officer said: "Well, you'll have to be placed under arrest because we can't allow anyone to stand here." The testimony of the officer continues:

"Q After placing him under arrest, what did you then do with him?"

"A I took him by the arm and I escorted him across Burnet Avenue to the lot, to the patrol wagon which I had placed in back of the parking lot * * *. When I reached this area, I asked him if he had any weapon on him, and he said, 'Well that's for you to find out' * * * and I frisked him. He didn't have any weapons on him. I placed him in the patrol wagon."

The offense charged under the ordinance is that the appellant was one of three, or more, persons assembled on a street or sidewalk, who were conducting themselves in a manner annoying to persons passing by or annoying to occupants of adjacent buildings. A careful reading of the entire record reveals that the case of the prosecution is subject to the infirmities of proof by imputation. The evidence does not establish the fact that the appellant, as a part of the lawless group, annoyed anyone except, perhaps, the officer who made the arrest after the crowd was dispersed. The only evidence of probative worth accounting for the appellant's presence is that shown by his own testimony. It may be fairly said that the unruly mob of persons did conduct themselves in such a manner as to violate the language of the ordinance; however, to find this appellant a part of the mob would require this Court to say that he was guilty by association only. This doctrine has no place in this case.

It may be that the appellant was in violation of other ordinances, but we are concerned now only with the violation of the ordinance set out above.

While we have grave doubt of the constitutionality of this ordinance, we prefer not to pass upon that question in this case. We confine our judgment to a failure of proof,

and will, therefore, on that basis, reverse and enter final judgment for the appellant.

Reversed and final judgment for appellant.

GUERNSEY, P.J. and HUNSICKER, J., CONCUR.

GUERNSEY, P.J. OF THE THIRD APPELLATE DISTRICT, HUNSICKER AND DOYLE, J.J. OF THE NINTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.